STATE OF MICHIGAN

COURT OF APPEALS

MYRON D. BOGUE, SR. and ANASTASIA N. BOGUE,

Plaintiffs/Counter-Defendants-Appellees,

v

MYRON D. BOGUE, JR. and SANDRA C. BOGUE,

Defendants/Counter-Plaintiffs-Appellants,

and

KEITH BOGUE and VIVIAN CARINO,

Intervenors-Appellees.

UNPUBLISHED
September 13, 2005

No. 254568
Otsego Circuit Court
LC No. 02-009816-CH

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Defendants Myron Bogue, Jr. and Sandra Bogue appeal as of right from a lower court judgment imposing a constructive trust, enforcing a promissory note, and awarding costs in favor of plaintiffs Myron Bogue, Sr. and Anastasia Bogue. We affirm.

I. FACTS

In 1950, plaintiffs purchased five acres of land located in Macomb County [Macomb property]. Plaintiffs built a house on the Macomb property where they lived until 1995.

Plaintiffs have one son, defendant Mryon Bogue, Jr., who is currently married to defendant Sandra Bogue. Myron, Jr. has four children from a first marriage, Debra, Keith, Vivian and Eric. Myron, Jr. married Sandra in 1979, and the couple had one child, Aaron. Myron, Jr. also adopted Sandra's daughter from a previous marriage, Carrie. In 1976, Myron, Jr. purchased a forty acre parcel of land and a home in Vanderbilt, Michigan where he and Sandra resided at the time of trial.

On October 1, 1981, defendants signed a promissory note and borrowed $24,076 from plaintiffs. Plaintiffs maintained a ledger sheet which indicated that defendants stopped making payments on the note in 1989 leaving a remaining balance of $22,830.

On June 20, 1985, plaintiffs purchased an eighty acre parcel of land adjacent to their son's property in Vanderbilt for $55,000 [Vanderbilt property]. Plaintiffs built a house on this property with the help of Myron, Jr. and moved onto the property in approximately 1995.

On May 16, 1986, plaintiffs quitclaimed their interest in the Vanderbilt property to themselves, and Myron, Jr. "as Joint Tenants, Not Tenants in Common, with full rights to the survivor." The circumstances regarding the intention of this transaction were disputed at trial.

Myron, Jr. maintained that the property was intended to pass to him and then to his children through his will. Myron, Jr. agreed that he told Keith, Vivian and Debra to select parcels of property. When asked why he told his children to select property potentially fifty years in advance of when they would inherit it, he responded, "I wanted to get a lay of the land as to what they might have wanted."

On July 21, 1986, defendants quitclaimed the Macomb property to plaintiffs. On December 18, 1986, plaintiffs quitclaimed the Macomb property back to defendants. On September 12, 1988, defendants again quitclaimed the Macomb property to plaintiffs. Finally, on March 27, 1989, plaintiffs conveyed the Macomb property back to defendants retaining a life estate for plaintiffs.

In 1991, plaintiffs purchased an additional twenty acres of adjacent property in Vanderbilt [Vanderbilt twenty]. Myron, Sr. testified that after he signed the bill of sale, he sent Myron, Jr. to have the deed drawn up. However, he stated that it was never his intention to have Myron, Jr.'s name placed on the deed for the twenty acres. Myron, Jr. testified that when he went to have the deed drawn up, the person preparing the deed noticed that he was not on it and asked why. He testified that he called his father and asked if he should be on the deed and his father said yes. The deed was then prepared conveying the property to "Myron Bogue, and Myron D. Bogue, Sr. and Anastasia N. Bogue, husband and wife, as joint tenants, not as tenants in common."

In 1999, Myron, Sr. responded to a flyer which detailed the benefits of a living trust. Myron, Sr. met with the attorney sponsoring the flyer and eventually set up and funded a trust. Myron, Sr. attempted to place both parcels of the Vanderbilt property into the trust. Myron, Jr. agreed to transfer the Vanderbilt twenty into the trust but refused to convey the original Vanderbilt property into the trust.

Plaintiffs filed a lawsuit against defendants alleging among other things that (1) defendants fraudulently induced plaintiffs to transfer them the Macomb property and the Vanderbilt property by promising that they would care for plaintiffs in their old age, (2) defendants owed them the balance of the 1981 loan, (3) defendants owed them rents collected from the Macomb property, and (4) defendants were placed on the deed for the Vanderbilt property to hold it for the grandchildren until plaintiffs' death. Plaintiffs requested that defendants be removed from the Macomb deed and that a constructive trust be imposed for the

Vanderbilt property. On August 21, 2003, the court granted Keith Bogue's and Vivian Corino's [Bogue] motion to intervene.

After a three day jury trial, the jury returned a verdict as follows: (1) finding that plaintiffs delivered the 1989 Macomb deed and defendants accepted it, (2) finding that defendants had not agreed to care for plaintiffs in their old age, (3) issuing an advisory finding that plaintiffs transferred the Vanderbilt property to defendants to hold for the benefit of the six grandchildren, and (4) finding that defendants had an outstanding debt of $22,830 on the 1981 promissory note. The court entered a judgment ordering that (1) the 1989 Macomb deed remain unchanged, (2) defendants owed plaintiffs rents collected for the Macomb property offset by taxes and insurance paid by defendants, (3) defendants' names be removed from the Vanderbilt property, (4) defendants pay the balance of the promissory note plus attorneys fees as detailed in the note, and (5) awarded one-fourth of allowed costs to plaintiffs.

II. CONSTRUCTIVE TRUST

Defendants first argue that the trial court erred when it imposed a constructive trust. We disagree.

A. Standard of Review

This Court reviews matters of equity de novo. *Grace v Grace*, 253 Mich App 357, 368; 655 NW2d 595 (2002). However, findings of fact are reviewed for clear error. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Id.*

B. Analysis

A constructive trust is an equitable remedy that arises independently of any actual or presumed intention of the parties to create a trust. *Potter v Lindsay*, 337 Mich 404, 411; 60 NW2d 133 (1953). A constructive trust is imposed by operation of law where fraud, undue influence or other circumstances render it inequitable for a wrongdoer to retain title. *Kent v Klein*, 352 Mich 652, 657-658; 91 NW2d 11 (1958). "A constructive trust need not arise because the property was wrongfully acquired, it may arise out of unconscionability and unjust enrichment." *Grasman v Jelsema*, 70 Mich App 745, 752; 246 NW2d 322 (1976); see also *Kent*, *supra* at 657. A constructive trust may be based upon a breach of fiduciary or confidential relationship. *Id.* at 655-656; *Plans v Donecea Estate*, 72 Mich App 202, 207; 249 NW2d 356 (1976).

In *Kent* a mother intended to divide certain real estate among five of her children. *Kent*, *supra* at 654. However, concerned for the mental health status of one of her sons, John, she legally transferred a certain acreage of the property intended for this son to the defendant, her daughter. *Id.* She did this on the advice of her son Harold and it was done without the defendant's knowledge. *Id.* On the same day she conveyed a separate portion of property to the

same daughter using a separate deed. *Id.* The defendant did not learn of the conveyance until after the death of John. *Id*. The defendant refused to convey the land to John's widow. *Id*. at 655. Our Supreme Court affirmed the imposition of a constructive trust finding the fact that "defendant made no promise to hold in trust is utterly irrelevant. . . . Fraud in the inception we do not require, nor deceit, nor chicanery in any of its varied guises, for it is not necessary that the property be wrongfully acquired. It is enough that property be unconscionably withheld." *Id*. at 656.

Here, plaintiffs, both over eighty years old, clearly had a relationship of confidence with their only son, Myron, Jr. *Kent*, *supra* at 655-656; *Chapman v Chapman*, 31 Mich App 576, 580; 188 NW2d 21 (1971). Myron, Jr. has helped care for his parents and their real estate by researching real estate investments and managing property on their behalf. It also appears that plaintiffs moved to Vanderbilt to be closer to their son. Although disputed at trial, plaintiffs' intent concerning the Vanderbilt property was sufficiently established. First, the deeds evince plaintiffs' intent. The Macomb property, which was conveyed during the same time frame, was transferred to both defendants. Myron, Sr. testified that he conveyed this property out of the goodness of his heart. However, the Vanderbilt property was conveyed only to Myron, Jr. which seems to indicate that it was something other then a gift intended for defendants. Next, the testimony of Keith Bogue and Vivian Bogue is significant because they both testified that their father, *Myron, Jr*., told them that the Vanderbilt property was being purchased with money that had been saved for the grandchildren so that they would inherit the property upon their grandparents' death. Myron, Sr. testified to the same. Myron, Jr. provides the only testimony in support of the theory that he was intended as the beneficial owner of the property. However, the trial court could reasonably have viewed this testimony unconvincing. Myron, Jr. inexplicably testified that he knew his name was on the deed in 1986 yet did not believe he was a partial owner until 1989.

It is apparent from a review of the record that the findings regarding the constructive trust were based on the testimony of trial witnesses' which the jury and the judge choose to believe. This Court recognizes the superior position of the finder of fact to test the credibility of the witnesses. *Chapman*, *supra* at 579. Accordingly, the court did not clearly err in its critical factfinding. Thus, it likewise did not err in imposing a constructive trust based on that factfinding.

III. MACOMB PROPERTY

Defendants next argue that the court erred when it refused to offset the amount owed on the promissory note by the cost of the alleged repairs to the Macomb property or the value of alleged labor performed by Myron, Jr. on the Vanderbilt property. We disagree.

A. Standard of Review

Defendants' arguments regarding the setoff present issues of fact. Findings of fact are reviewed for clear error. *Walters*, *supra* at 456. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Id*.

B. Analysis

Regarding the repairs made to the Macomb property, defendants present their argument on appeal as an issue of waste committed by a life tenant. This is merely a rechacterization of the argument that defendants are entitled to a setoff for repairs they allegedly made to the Macomb property. Neither the lower court nor the jury made a finding regarding waste committed by the plaintiffs. Rather, the lower court found that there was insufficient evidence to prove the cost of repairs performed by the defendants. Accordingly, this Court will address the trial court's findings of fact regarding the cost of the repairs. The trial court did not commit clear error in refusing to credit defendants with an offset for the repairs they performed on the Macomb property. The evidence supports a finding that defendants failed to demonstrate their out of pocket expenses for the clean up of the Macomb property. The thirty-four thousand figure appears to be a tax estimate and testimony indicates that insurance paid for a large portion of the clean up expenses. The court did grant an offset to defendants' taxes and insurance costs which were proven with documentation. Therefore, this Court is not left with the definite and firm conviction that a mistake has been committed. The trial court did not clearly err when it disregarded defendants' alleged clean up expenses.

As to the labor performed on the Vanderbilt property, defendants essentially ask this Court to review the jury's determination that the 1981 promissory note was not forgiven. The jury specifically answered "no" to the verdict form question, "did plaintiffs forgive the Defendants from paying the balance on the promissory note?" Defendants argued in closing that any amount owed on the promissory note should be offset by labor Myron, Jr. performed on the Vanderbilt property. The jury verdict form asked the jury, "What, if any, is the balance owed by the Defendants to Plaintiffs on the Promissory note?" The jury answered that $22,830.

After hearing the evidence the court *and* the jury determined that Myron, Jr.'s labor was not intended to forgive the promissory note and did not offset the amount defendants owed on the promissory note. The court did not clearly err when it refused to offset the amount owed on the promissory note by the alleged labor of Myron, Jr. Myron, Jr.'s estimates of his labor costs are speculative and self serving. Myron, Jr. also admitted that he was helped by outside contractors. Further, Myron, Jr.'s testimony about a smile from Anastasia and a snicker from Myron, Sr. hardly constitutes strong evidence of their intent to forgive the loan.

IV. STATUTE OF LIMITATIONS

Next defendants argue that the court committed plain error by enforcing the promissory note after the statue of limitations had run. We disagree.

Defendants failed to properly preserve and present this issue for appeal. They concede that they failed to properly preserve the statute of limitations defense. Defendants properly raised the statute of limitations as an affirmative defense in their answer. However, defendants did not address the issue again until after the jury had rendered its verdict. The trial court determined that the defense had been abandoned because defendants failed to move for summary disposition on the issue, failed to move for directed verdict on the issue, and failed to object to jury instructions. We note that because defendants failed to properly present the issue to this Court in the statement of questions presented this Court could refuse to consider this issue on appeal. Ordinarily, no point will be considered which is not set forth in the statement of the

questions presented. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). However, this Court will review this unpreserved issue for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). Accordingly, defendants must show that any error in this regard was plain and that it affected their substantial rights in order to obtain relief. *Id*.

Assuming for the sake of argument that the statue of limitations had run, the trial court is not required to sua sponte advance defendants' affirmative defenses. The error, if any, belongs to defendants for failing to pursue their defense. Moreover, there is no violation of law in enforcing a contract for which the statute of limitations has run. Rather, an affirmative defense, such as the statue of limitations, is waived if not properly pleaded. MCR 2.111(F)(2)-(3); *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993). The court did not commit plain error by enforcing the contract.

V. COSTS

Finally, defendants argue that the trial court erred by imposing costs in this matter. We again disagree.

A. Standard of Review

This Court reviews an award of costs pursuant to MCR 2.625 for an abuse of discretion. *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 245; 635 NW2d 379 (2001). An abuse of discretion occurs only if the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003).

B. Analysis

MCR 2.625 provides in pertinent part:

> **(A) Right to Costs.**
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> (1) In General. Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.
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> * * *
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> **(B) Rules for Determining Prevailing Party.**
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> * * *
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> (2) Actions With Several Issues or Counts. In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count. If there is a single cause of action alleged, the party who prevails on the entire record is deemed the prevailing party.

Plaintiffs filed and served defendants with a bill of costs for $2,577.80. The court awarded plaintiffs twenty-five percent of allowable costs under MCR 2.625 resulting in an award of $602. The trial court did not abuse its discretion. Plaintiffs prevailed on two of four issues, the constructive trust and the promissory note. This award appears to reflect costs associated with the constructive trust. Presumably, the court did not award additional costs for the promissory note because attorney fees and costs were separately awarded to plaintiffs as part of the judgment under the promissory note. Defendants did not recover any costs under MCR 2.562 because they failed to file the affidavit and proofs as required by the court rule.

Defendants' assertion that the court imposed $3,000 for costs under MCR 2.652 is simply incorrect. The judgment states "that $602, plus statutory interest since the date of the filing of the Complaint, be awarded to the Plaintiffs as statutory costs and fees pursuant to MCR 2.625." The court clearly awarded $3,000 in connection with the promissory note which provided for attorneys fees and costs. The promissory note provided in relevant part:

> If this note is not promptly paid in accordance with its terms and is placed in the hands of any attorney for collection the undersigned agree to pay, in addition to the unpaid principal balance hereof, all costs of collection together with reasonable attorney fees.

Defendants fail to cite the promissory note and do not challenge the award of attorney fees.

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Bill Schuette